IN RE ARBITRATION BETWEEN:

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL #789

and

SAUER MEMORIAL HOME

DECISION AND AWARD OF ARBITRATOR

FMCS Case # 070314-54711-3

JEFFREY W. JACOBS

ARBITRATOR

June 4, 2007

IN RE ARBITRATION BETWEEN:

UFCW Local #789,

Union

and

DECISION AND AWARD OF ARBITRATOR
FMCS Case # 070314-54711-3

Sauer Memorial Home,

Employer.

APPEARANCES:

FOR THE UNION:	**FOR THE EMPLOYER:**
Roger Jensen, Esq. Attorney for the Union	Joe Roby, attorney for the Employer
Don Seaquist, UFCW Local #789	Grant Brandon, Administrator
Shirley Muelken, UFCW Local #789	Wanda Bastian, Dir. of Nursing
Rick Powell, Steward UFCW Local #789	Tracy Sonnenfeld, Payroll Clerk

PRELIMINARY STATEMENT

The above matter came on for hearing on May 7, 2007 at 211 Huff St, Winona Minnesota. The parties filed Briefs on May 25, 2007 at which time the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2005 through September 30, 2008. Article 10 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service.

ISSUES PRESENTED

Did the Employer violate the collective bargaining agreement by removing the grievant from group health insurance coverage for the month of October 2006? If yes, what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

Article 16.1
Health and Welfare

16.1 The Employer agrees to provide health care coverage for full time employees.

Article 5
Classification of Employees

Full-time employees are those employees regularly scheduled to work at least eighty (80) hours in any consecutive fourteen (14) day period. A full time employee must be paid an average of 36 hours per week over each three-month period to maintain full time status. Exceptions will be made for employees on an approved leave of absence and those who take reduced hours per the Employer's request.

Article 7
Seniority

Article 7.4 Reduction of hours: When hours need to be reduced, these steps shall be followed in this order within the affected job classification and shift:

1) Volunteers among employees on overtime.

2) Employees on overtime (Involuntary reduction).

3) Volunteer by seniority on a rotating basis among employees on straight time

4) Casual on-call employees.

5) Employees on straight time (involuntary reduction) by inverse order of seniority.

If an employee is inadvertently skipped at step 3), that employee shall be offered the next opportunity to volunteer.

PARTIES' POSITIONS

UNION'S POSITION:

The Union contended that the Employer violated the collective bargaining agreement when it removed the grievant, and others who may be similarly situated in the future, from group health insurance since the Employer requested that she reduce her hours. In support of this position the Union made the following contentions:

1. It is stipulated that the grievant in this matter was "scheduled to work at least 80 hours in any consecutive 14 day period" and was otherwise a "full time employee" pursuant to the definition of that term in Article 5.1.

2. The Union pointed to the above provisions in order and argued that Article 16 requires that the Employer provide health coverage for all full time employees. Article 5.1 then defines "full-time" employee as one who is regularly scheduled to work at least eighty (80) hours in any consecutive fourteen (14) day period. The Union also acknowledged that the grievant's average fell below the required 36 hours per week over a 3-month period prior to October 2006 but then pointed to the provisions of Article 5.1 that creates an exception to this rule where the employee is required to reduce hours due to an "Employer initiated reduction" of those hours, i.e. where the Employer asks or requires the employee to reduce hours for whatever reason.

3. Article 7.4 the Union argued merely provides the process by which a reduction of hours is to occur. The Union pointed to the first sentence of Article 7.4 that provides that "when hours need to be reduced, these steps shall be followed" and asserted that it is clear that this entire provision is prefaced by an Employer initiated reduction. This is thus very different from a situation where the employee approaches the Employer and asks for time off. Moreover, there would be no other reason to invoke the provisions of Article 7.4 other than the scenario where the Employer has initiated the reduction of hours.

4. Here, the Union asserted that the Employer initiated the reduction of hours, even though the grievant had volunteered to take the time pursuant to Article 7.4. Thus, the exception found in Article 5.1 cited above applies here. In other words, the grievant did not lose her status as a full time employee since the reduction of hours that caused her to fall below the 36 hour per week average since she "reduced hours per the Employer request." See Article 5.1.

5. Thus Article 5.1 applies here quite literally to create an exception to the requirement of maintaining 36 hours per week on average over 3 months. While there is no question that the grievant's hours did fall below this average they did so because the Employer reduced her hours. The fact that she had volunteered to have her hours reduced pursuant tot the provisions of Article 7.4 does not alter the fact that the Employer initiated this reduction. Someone would have had to reduce their hours in this scenario and the fact that it was the grievant as opposed to some other employee is a creature of the process set forth in Article 7.4 and does not take her out of the exception created by Article 5.1.

6. The Union acknowledged that the grievant suffered no actual loss during October 2006 and had no actual health claims. Thus the Union is not seeking any sort of back pay or other retroactive payment. It seeks a prospective remedy interpreting the provisions of Article 5.1 to require the Employer to continue health coverage for full time employees whose hours are reduced below the 36 hours per week average were that reduction is caused by an Employer initiated reduction of hours, whether the affected employee has signed up on the so-called volunteer list or not.

The Union seeks an award of the arbitrator sustaining the grievance in a prospective way only, i.e. no back pay or retroactive payment of health insurance premiums. The Union in effect seeks an advisory opinion regarding the proper interpretation of the contract clauses at issue in the matter in order to aid the parties in administering this contract in the future.

EMPLOYER'S POSITION

The Employer's position is that there was no contract violation here since the grievant voluntarily took the time off and was not specifically requested to do so by the Employer. In support of this position the Employer made the following contentions:

1. The Employer first argued that the matter was time barred under the contract but waived that defense in this matter for purposes of this case only and without setting a binding precedent in any way.

2. The Employer noted that the grievant fell below the required 36 hours per week average over three months as set forth in Article 5.1. Accordingly she was no longer considered a full time employee under that provision. The Employer also pointed out that the definition of full time contemplates and includes hours *paid*, as opposed to hours worked. Thus, an employee can use vacation hours or other leave hours to be paid in a week in order to keep the average hours paid above the required 36 per week. It was only because the grievant in this case did not have sufficient vacation or leave hours that her hours paid fell below 36 per week for the 3-month period prior to October 2006.

3. The Employer further argued that the exception set forth in Article 5 did not apply since the grievant volunteered to have her hours reduced. The Employer introduced the "Volunteer Reduction Sign-Up" sheets wherein the grievant's name appears many times.

4. The Employer pointed out that Article 7.4 sets forth the mechanics of reducing hours. See Employer Brief at page 4. Pursuant to the process set forth there and based on her seniority, her hours were typically reduced before other employees. The Employer further argued that it is manifestly unfair to penalize the employer where the employee voluntarily chooses to have her hours reduced if the opportunity arises.

5. The Employer also pointed out that HIPAA does to apply here either since there was a 31 day break in health coverage, far short of the 63 days set forth in 26 U.S.C.A. 9801 K 100 Subchapter (A)(c)(2)(A). See Exhibit 14. The Employer also pointed out that once the grievant's hours rose above the 36 hour per week average she was immediately placed back on health coverage and that she did not suffer any uninsured claims during that month.

6. The essence of the Employer's argument is thus that the grievant, and anyone similarly situated, is not covered by the exception found in Article 5.1 since she volunteered to have her hours reduced pursuant to the procedure found in Article 7.4 Thus this scenario is no different from one in which the employee asks to leave or have their hours reduced for some personal reason. As such, once her hours fall below the required 36 hours per week average, she is no longer considered full time and thus no longer eligible for health coverage as a full time employee. See Article 16.1, requiring health coverage only for full time employees.

The Employer seeks an award of the arbitrator denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

The underlying facts giving rise to the instant grievance are not in dispute and were stipulated by the parties. The grievant is generally regularly scheduled to work at least 80 hours in a pay period and that she met that part of the definition of full time employee in Article 5.1. It was also agreed that for the 3-month period prior to October 2006, her hours paid did indeed fall below the 36 hour per week average found in Article 5.1. This was due to a reduction in her hours as will be discussed below and due to the fact that she apparently did not have sufficient vacation or other leave hours to cover the time off and to be paid for those hours during the weeks in which she was asked to reduce her hours.

It was also clear that the grievant signed up on a sheet called the "Volunteer Reduction Sign Up" sheet to be the first one called upon to reduce hours in the event the Employer needed to cut hours due to a low patient census or for some other reason. It was clear though that the only time her hours were reduced as the result of being on this sheet were in those instances where the Employer felt it necessary to reduce hours. The decision to reduce hours was in those circumstances entirely within the employer's discretion; the fact that the grievant was on the list only governed when, not whether, her hours would be reduced. While it is certainly true that she could have chosen to not place her name on that list it is equally true that in the instances where hours needed to be reduced, someone's hours would have been reduced pursuant to the procedure set forth in Article 7.4. This is precisely what the exception language in Article 5.1 appears to cover so that where the Employer reduces hours, and that results in a reduction of an employee's hours below 36 per week, that employee will not suffer the loss of health insurance due to the employer's need to reduce hours.

Finally, it was clear that the grievant in this matter did not suffer any adverse consequences, fortunately, due to the loss of her health coverage during October 2006 and that she was not charged a health insurance premium during that month. The Union agreed that in the event the grievance is sustained, there is no claim for back pay or retroactive health insurance premiums here. The parties seek an opinion of the arbitrator rendering an interpretation on a prospective basis on these facts whether there was a violation of the contract by removing the grievant from health coverage for October 2006. This really calls into question whether the exception language found in Article 5.1 applies in this case. Based on these facts and this language it is determined that it does.

The starting point is obviously the contract language itself. The relevant provisions are set forth above but are cited here as well. Article 16 provides simply that "The Employer agrees to provide health care coverage for full time employees." Article 5.1 defines the term "full time employees as " … those employees regularly scheduled to work at least eighty (80) hours in any consecutive fourteen (14) day period.

A full time employee must be paid an average of 36 hours per week over each three-month period to maintain full time status. Exceptions will be made for employees on an approved leave of absence and those who take reduced hours per the Employer request." It was agreed that the grievant in this case is "regularly scheduled to work at least 80 hours in any consecutive 14 day period." It is the 36-hour per week average and whether the language of Article 5.1 applies here to bring the "exception" language into effect. The question is thus whether the exception applies to the situation where the Employer initiates a reduction of hours but where the employee has signed up on the "volunteer" sheet to be called first to have their hours reduced.

The clear import of the provisions of Article 5.1 is that if the exception applies then even though the affected employee's hours fall below the 36-hour per week requirement, they are still considered full time employees and thus still entitled to health care coverage pursuant to Article 16.1. The question in this case is whether under these facts, the exception language of Article 5.1 applies here or not.

Article 7.4 provides for the process by which the reduction of hours occurs. The language of Article 7.4 provides only for the process by which the determination is to be made as to which employees are asked, or in some cases required, to reduce their hours. The language provides as follows:

When hours need to be reduced, these steps shall be followed in this order within the affected job classification and shift:

1) Volunteers among employees on overtime.

2) Employees on overtime (Involuntary reduction).

3) Volunteer by seniority on a rotating basis among employees on straight time

4) Casual on-call employees.

5) Employees on straight time (involuntary reduction) by inverse order of seniority.

Here the employee in question placed her name on a sheet to be called upon firstto reduce her hours in the event the Employer needed to cut hours for whatever reason. In this case the grievant was covered under Paragraph 3 of the list and was called upon by "seniority on a rotating basis among employees on straight time."

Both parties acknowledged that this case turns on the question of who is requesting the hours be reduced. The Employer argued that the act of placing her name on the so-called volunteer sign up sheet was in effect a request by the employee to reduce her hours. The Employer argued that this was no different from a request by the employee for time off for personal reasons since no one is forced to place their name on the sign-up sheet. The fallacy of this argument is that if the Employer had not needed to cut hours the grievant would never have had her hours cut because of being on that list. It was due to the *Employer's* request to reduce hours that the procedure in Article 7.4 even came into effect.

Moreover, the fact that the grievant signed up on the volunteer list does not mean she was making a request for the time off but rather that she was willing to have her hours reduced ***if*** the Employer asked her to. This is a vastly different scenario from one in which the *employee* approaches the *Employer* and wants time off for some reason unique to that employee. Here this reduction of hours was due to an Employer initiated reduction of hours. The fact that the employee placed her name on a list to be called first does not alter the underlying reason for the need for the reduction in hours.

Applying standard contract interpretation principles to this language it is clear that the language of Article 5.1 must mean something. There would be little reason to have the language creating the exception to the 36-hour requirement in Article 5.1 if that language did not explicitly apply in this very situation. The language of Article 5 clearly contemplates that hours may need to be cut and Article 7.4 simply provides for how that is to be done. Article 7.4 calls for some employees to volunteer to have their hours reduced first. That however does not alter the fact that the hours needed to be reduced by the Employer in the first place. This situation quite clearly falls into the exception created by Article 5.1.

It should be noted that this holding is limited to the facts presented here. This award holds that in the situation where hours need to be reduced by the Employer the fact that an employee has signed up on the Volunteer list pursuant to Article 7.4 to have his/her hours reduced first does not take that employee out of the exception created by the final sentence of Article 5.1. Under those circumstances, the affected employee remains a full time employee entitled to health coverage pursuant to Article 16.

AWARD

The grievance is SUSTAINED as set forth above. As stipulated to at the hearing, there is no back pay or retroactive payments awarded pursuant to this Award; the award shall operate prospectively. The parties shall bear the costs of the arbitrator's fee equally as set forth in statement attached to this Award.

Dated: June 4, 2007

_____
Jeffrey W. Jacobs, arbitrator

UFCW and Sauer Memorial Home.doc